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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

RAYMOND I. KLAGISS,

Petitioner,

v.

STATE OF INDIANA,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Indiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether IC 35-46-1-4(a)(1), defining the crime of Neglect of a Dependant, is unconstitutionally vague.

II. Whether IC 35-46-1-4(a)(1), is unconstitutional in that it fails to sufficiently define the conduct constituting Neglect of a Dependant.

III. Whether the Defendant was convicted of an offense with which he was not charged.

IV. Whether the State failed to produce sufficient evidence of probative value to support the jury's verdict of guilty of Neglect of a Dependant.

V. Whether the burden of proof was inadequate to protect the Defendant's right to due process.

VI. Whether the trial court impermissibly limited the testimony of the Defendant's expert witness.

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Respondent, State of Indiana, by its counsel, Linley E. Pearson, pursuant to Rule 15 of the Rules of this Court, respectfully opposes the Petition for Writ of Certiorari to review the decision of the Supreme Court of Indiana, in the case of *Klagiss v. State*, 585 N.E.2d 674 (Ind. Ct. App. 1992).

STATUTORY PROVISION INVOLVED

Indiana Code 35-46-1-4(a)(1) reads as follows:

> (a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:
>
> (1) places the dependent in a situation that may endanger his life or health;
>
> * * *
>
> commits neglect of a dependent, a Class D felony. However, except for a violation of clause (4), the offense is a Class B felony if it results in serious bodily injury. It is a defense that the accused person, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent.

STATEMENT OF THE CASE

Procedural History

The Defendant was indicted by a grand jury on April 3, 1989 when he was charged with Reckless Homocide, a Class C felony under IC 35-42-1-5, and Neglect of a Dependant, a Class B felony under IC 35-46-1-4 (R.14). Trial was held from July 16, 1990 through July 19, 1990 (R.6, 840). On July 20, 1990, the jury found the Defendant to be guilty of Neglect of a Dependant (R.92). The Defendant was then sentenced to six (6) years of imprisonment (R.1023).

Subsequently, an appeal ensued, and the Indiana Court of Appeals, District Two, affirmed the trial court in all respects on 1/30/92, *Klagiss v. State*, 585 N.E.2d 674 (Ind. Ct. App.).

The Indiana Supreme Court denied the Defendant's Petition for Transfer on 3/11/92. The Defendant's Petition herein then resulted.

Facts Adduced at Trial

In his Statement of the Case, The Defendant's initial comments concern the background of his family as political refugees from Soviet repression in their native Latvia. One might wonder how the Defendant knew the details of his family history in Latvia when he left that troubled nation at the tender age of six (6) or seven (7). This doubt is particularly significant when one considers that he accuses the Komitet Gossudarrstvennoi Bezopastnosti, KGB, of murdering his father, when the Soviet secret police was then called the Narodnyi Kommissariat Unutrennikh Dell, NKVD, and did not become the KGB until March 13, 1954.

The facts relevant to the offense herein were that at the time of her death, Jadviga Klagiss (hereinafter, the victim), was an eighty year-old woman who was apparently becoming senile, but who was quite active for her age, often being described as "spry" (R.443, 445, 447, 450-456, 471-472, 477, 481, 515).

On February 18, 1991, Wayne Bruness, a former law associate of the Defendant (the victim's son), notorized documents he had prepared which gave the Defendant the victim's power of attorney, and more importantly, deeded her home to him (R.617, 618, 620).

On March 9, 1988, at approximately 3:30 a.m., a woman claiming medical expertise (presumably, the Defendant's soon-to-be-wife, Susan Klagiss, who is a nurse), called Kay Nimocks, a MetroHealth triage nurse (R.536, 537, 538).

The caller said she wanted to know what to do as the victim (who was a MetroHealth patient) had no pulse, was not breathing and her fingers had turned blue (R.538). Nimocks told her to call the Marion County Sheriff's Department, so that the Coroner could be summoned (R.538). The police were called at 4:11 a.m. (R.227).

When Gary Gray, a Deputy Coroner, arrived at the scene, he became suspicious because of several oddities. The Defendant, his girlfriend and former law associate were the only people present beside police officers. However, he could get only limited information from them (R.156, 157). The victim's body appeared to have been posed in her bed, but the witnesses denied tampering with the body (R.188). The autopsy revealed that there was a fresh laceration to the victim's left eye that would have bled until the moment of death, but there was no blood on the victim (R.599). Similarly, the bandage on the victim's bedsore showed no drainage, which would have occurred with even a few minutes of contact with a living victim (R.595). The victim's night clothes were clean, while the bed was urine-stained (R.158).

The Defendant and his girlfriend stated that the victim was alive when they went downstairs to deal with laundry, but that she was dead when they returned less than five minutes later (R.267-268). After being informed that this did not jibe with the autopsy results, the girlfriend noted that the Defendant did not immediately come downstairs with her (R.271-272).

Dr. Dean Hawley performed the autopsy on the victim (R.547). The victim had suffered some 21 separate visible injuries (R.554). The various bruises were of significantly different age, which was demonstrated by their varying colors (R.554, 564-567). The eyelid of her left eye was freshly lacerated to the extent that it would still have been bleeding at

the time of death (R.557-558). The victim's sixth cervical vertebrae was severed, causing hemorrhaging in the nearby tissues from the base of her skull to the mid-back (R.559, 561). The two pieces of the bone were so greatly displaced that they no longer sat upon one another (R.560). This crushed the larynx, causing an immediate blockage of the victim's air passage (R.560). The spinal cord was effectively severed at this site (R.561, 562). This injury would have been "promptly fatal" (R.563).

SUMMARY OF THE ARGUMENT

This case is an inappropriate vehicle for review of the Indiana statute defining Neglect of a Dependant as:

I. Indiana Code 35-46-1-4(a)(1) is not unconstitutionally vague.

II. Indiana Code 35-46-1-4(a)(1) is not unconstitutional as it clearly defines the behavior that was prohibited.

III. The Defendant was not convicted of an offense for which he was not charged.

IV. The State of Indiana did produce sufficient evidence of probative value to support the verdict of the jury.

V. The courts of Indiana have not adopted a burden of proof that varies from the traditional definition of "beyond a reasonable doubt".

VI. The trial court correctly refused to allow the Defendant to ask hypothetical questions for which there was no foundation.

REASONS FOR DENYING THE WRIT

I. and II. In these two (2) issues, the Defendant attacks the constitutionality of IC 35-46-1-4(a)(1), as it is alleged to be unconstitutionally vague and that it does not advise a citizen of what behavior is prohibited. This is simply incorrect.

In its decision, the Indiana Court of Appeals noted that an attack on a statute for being unconstitutionally vague, that the statute must define the prohibited conduct in such a way ". . . that persons of ordinary intelligence can understand what it prohibits," *Klagiss*, *id.*, at 682. The court then quoted the statute above and concluded that there was no unconstitutional ambiguity. As the court wrote:

> A person blessed with any measure of common understanding would recognize that endangering a dependant by abusing her in a manner which caused her to die of a broken neck would violate the statute.

Klagiss, at 682. The court below therefore concluded that the statute was therefore constitutional.

The rule of law cited by the court below is precisely the rule set by this Court in *Grayned v. City of Rockford*, 92 S.Ct. 2294, 408 U.S. 104, 33 L.Ed2d 222 (1972). Thus, the standard invoked below was correct. The issue is therefore whether the court's application of the rule was incorrect. This could not be the case. The logic noted by the court below is unassailable. Any treatment of a dependant that was so extreme that it would actually sever the dependant's spinal chord must certainly be within the behavior prohibited by the statute. Thus, the State would urge that these issues do not justify granting a Writ of Certiorari.

III. and IV. In these two issues, the Defendant asserts that he was not charged under the above-quoted statute and that the evidence did not suppport the conviction. The Defendant's argument is certainly unconvincing.

The Defendant argues that the Information charged him with the specific act of neglecting the victim by breaking her neck, while the instructions to the jury referenced only the general statute. This issue is procedurally defaulted as the Defendant has never previously raised the issue of the wording of instructions, *Murray v. Carrier*, 477 U.S. 478, 489 (1986). Thus, this issue is unavailable here.

The Defendant's assertion that the evidence did not support the conviction is without merit. The Statement of the Case above clearly demonstrates that the State produced overwhelming evidence, including the Defendant's videotaped statement, that he in fact committed the charged offense. Therefore, the Defendant has certainly failed to demonstrate the level of inadequacy of evidence that would justify review, *Taylor v. Kentucky*, 436 U.S. 478 (1978). Clearly then, the Defendant has wholely failed to demonstrate a failing in the evidence.

V. The Defendant here attacks the decision below as the court allegedly applied a standard other than the traditional one of "beyond a reasonable doubt." This simply did not happen.

It is certainly well settled that the Constitution, via the due process clause of the Fourteenth Amendment, prevents conviction in a criminal case on any level of proof less than "beyond a reasonable doubt," *Cage v. Louisiana*, 111 S.Ct. 328, ___ U.S. ___ (1990), *Carella v. California*, 109 S.Ct. 2419, ___ U.S. ___ (1989), *rehearing denied*, 110 S.Ct. 23, ___ U.S. ___. However, as noted in *Taylor* above, upon

appellate review, the question is whether there was evidence of probative value to support the verdict. Thus, the comment about "substantial evidence" in the court's opinion was a reference to the standard on review and had nothing to do with the trial court jury's determination. Therefore, the Defendant has again failed to demonstrate a reviewable issue.

VI. Finally, the Defendant urged that the trial court erred when it refused to allow certain hypothetical questions. However, it is clear that the factual basis for the questions did not suppport them, and they were therefore improper.

In both of the examples at issue herein, the Defendant asked hypothetical questions that included assumed facts that had not been produced at trial. The court below affirmed the trial court's refusal to allow the questions on this basis. The assumed facts in question were that the victim had suffered a previous injury and that she showed no other evidence of trauma. The only evidence for the former was a vague reference by the Defendant in his statement to the police, and the other was directly contradicted by every witness who viewed the body. It is well settled that hypothetical questions based upon facts not in evidence are objectionable, and may be excluded, *U.S. v. Altenburger*, 549 F.2d 702, *cert. denied*, 431 U.S. 923. Here, it is clear that the hypothetical questions at issue were improper, and therefore, there was no error committed when the trial court refused to allow the questions.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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